No.

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT DAVID TOWNSEND,

v. *Petitioner*

UNIVERSITY OF ALASKA, ET AL

Respondents

On Petition for Writ of Certiorari

To The United States Court of Appeals

for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

George C. Aucoin
Counsel of Record
Law Offices of George C.
Aucoin, APLC
3500 N. Hullen St.
Metairie, LA 70002
Tel: 985.727.2263 Fax: 951.7490

QUESTIONS PRESENTED FOR REVIEW

The United States Court of Appeals for the Ninth Circuit dismissed the Appellant's claim for lack of subject matter jurisdiction. The Court held that reading the provision in U.S.C. 38 § 4323(b)(2) that "[a USERRA] action *may* be brought in a State court of competent jurisdiction in accordance with the laws of the State" in conjunction with the 11th Amendment's sovereign immunity provisions effectively limited such an action to State court.

The question for review is whether the United States Court of Appeals for the Ninth Circuit erred in concluding that Congress did *not* intend to provide an optional right of action in federal district court for USERRA actions brought by private persons against state employers and that such actions by private individuals against state employers are thus barred by the Eleventh Amendment's sovereign immunity provisions.

PARTIES TO THE PROCEEDING

I. Petitioner named herein is Robert David Townsend;

II. Respondents named herein are as follows: University of Alaska, University of Alaska at Fairbanks, Mike Setterberg, Terry Vrabec, Carolyn Chapman, Mike Hostina, Kathleen Schedler, P.E.,

TABLE OF CONTENTS

University of Alaska at Fairbanks – No. 07-35993

C. United States District Court for the District of Alaska Order: *Robert David Townsend v. University of Alaska and University of Alaska at Fairbanks* – No. 3:06-cv-000171

TABLE OF AUTHORITIES

CASES

STATUTES

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 543 F.3d 478, and is reprinted in the Appendix to the Petition ("Pet. App.") at 21A-34A. The District Court's opinion is reported as 3:06-cv-000171, and is reprinted at Pet. App. 10A-20A.

JURISDICTION

The Court of Appeals entered its judgment on September 5, 2008. The District Court had jurisdiction of the case on the merits pursuant to 28 U.S.C. §§ 1331 and 38 U.S.C. §4323. The Court of Appeals had jurisdiction over this matter pursuant to 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

This case involves provisions of U.S.C. 38 § 4323(b)(2). The pertinent provisions are reproduced in the Appendix at Pet. App. 38 A.

STATEMENT OF THE CASE

This matter presents an opportunity for this most honorable Court to resolve a significant legal controversy which is vital to U.S. national security. That is, whether men and women serving in the Armed Forces of the United States are entitled to a right of action in federal district court against state employers under USERRA as well as the extent to which the Eleventh Amendment's Sovereign Immunity powers can be abrogated by USERRA

pursuant to Congress' Article I War Powers. Pet. App. 21A-34A. The outcome of this case is detrimental to the fair litigation of Uniformed Services Employment and Reemployment Act ("USERRA") cases across the United States.

The Ninth Circuit Court of Appeals found that a federal district court lacks jurisdiction over a USERRA action brought by an individual against a state as an employer. This errant conclusion was based upon the Court's reading of 38 U.S.C. §4323(b)(2) in conjunction with the Eleventh Amendment's sovereign immunity provisions.

38 U.S.C. §4323(b)(2) states only, "In the case of an action against a State (as an employer) by a person, the action ***may*** be brought in a State Court of competent jurisdiction in accordance with the laws of the State." The Court reasoned that the Eleventh Amendment's provision regarding sovereign immunity to "arms of the state" are applicable in a USERRA context and in this matter[1]. The Court further held that the term "may" was insufficient to to abrogate sovereign immunity and, accordingly, that any action brought against a State (as an employer) ***must*** be brought in a State Court.

As further detailed herein, such logic fails because subsequent Supreme Court opinions have held that, contrary to the case law relied upon by respondents, a grant of jurisdiction to state courts framed such that a plaintiff "may" bring or maintain a suit in state court does not grant exclusive jurisdiction to the state courts. Rather, general federal question or federal diversity jurisdiction statutes are still

[1] The Respondent, Alaska University, is considered an "arm of the state" for purposes of the Eleventh Amendment's sovereign immunity provisions according to the Ninth Circuit.

applicable to the matter. In this instance, the general federal question, or more correctly, "arising under" jurisdictional statute, 28 U.S.C. §1331, therefore supports the maintenance by federal court of jurisdiction over this matter. As further detailed in this Petition, there is also ample authority for the proposition that the Eleventh Amendment does not generally operate to bar the assertion of a USERRA claim against a state.

Furthermore, this matter presents important national implications. The just resolution of this case is fundamental to the enforcement and preservation of USERRA. The Ninth Circuit's refusal to hear the Petitioner's claim sets a dangerous trend in USERRA law as state-employers within those circuits are now able to engage in free-range discrimination against U.S. servicemen and women as they return to the civilian workforce. By stringently limiting access to suitable remedies and courts of proper jurisdiction, the Ninth Circuit's ruling discourages non-career military service. This result directly opposes one of the stated goals of USERRA, which is to encourage military service 38 U.S.C. §4301 (a)(1).

A. Factual Background

1. This matter is a claim brought by Mr. David Townsend against the University of Alaska and University of Alaska at Fairbanks (collectively "UAF" or "defendants") pursuant to the Uniformed Service Employment and Reemployment Rights Act of 1974, as amended ("USERRA"), 38 U.S.C. § 4301 et seq. Mr. Townsend worked in the power plant at the University of Alaska Fairbanks. On August 1, 2001, Mr. Townsend joined the Alaska Air National Guard.

He disclosed this fact to his supervisor at the University of Alaska Fairbanks on October 14, 2001. Pet. App. 3-A (Complaint at ¶¶ 9 and 10).

2. Mr. Townsend received orders and went on active duty for training from November 27, 2001 to May 14, 2002. Pet. App. 3-A (Complaint at ¶ 12.) On May 19, 2002, he reported for work but was informed by Mike Setterberg, his supervisor, then UAF Police Chief Terry Vrabec, and others that he was fired and was thus trespassing. When he objected, he was "rehired" as a janitor. Pet. App. 3A-4A (Complaint at ¶¶ 13-15.)

3. Over the following period of nearly two years various actions occurred which Mr. Townsend contends constituted a pattern of harassment or interference with his employment based on his military status. Pet. App. 4-A (Complaint at ¶¶ 16-18.) The details of these actions, however, are not important for the present Writ Application.

4. Mr. Townsend again went on active duty for training from May 27, 2003 through June 27, 2003. Pet. App. 5-A (Complaint at ¶¶ 19 and 20.) On October 9, 2003, via a letter signed by Kathleen Schedler, P.E., he was terminated from his employment with UAF for alleged threats and for allegedly making dishonest statements about his military obligations. Pet. App.6-A (Complaint at ¶ 23.)

5. Mr. Townsend contends that this action was really nothing more than a mere pretext for discrimination against him because of his military status and performance of his military duty, and this civil action was filed to seek redress for his resulting damages.

B. Proceedings Below

Petitioner commenced this action in federal district court against his former employer, the University of Alaska, alleging violations of USERRA[2]. The Petitioner invoked the district court's jurisdiction pursuant to 38 U.S.C. § 4323(b)(3), which provides that "[i]n the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action." Neither party disputed that the University of Alaska is an arm of the State of Alaska.

The State moved to dismiss Petitioner's action, arguing that the federal district court lacked subject matter jurisdiction over a USERRA claim. The Respondent argued that USERRA's provision that "[i]n the case of an action against a State [employer] by a person, the action *may* be brought in a State court of competent jurisdiction in accordance with the laws of the State[3]," means that the federal district court lacks jurisdiction over a USERRA claim against a State-employer brought by a private individual and, essentially, such an action *must* be brought in state court. Accordingly, the district court granted the State's motion and dismissed the case for lack of jurisdiction. The Petitioner appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed the District Court's ruling, holding: (1) a federal district court lacks jurisdiction over a USERRA action brought by an individual against a state as an employer; (2)

---

[2] Townsend alleged that he was fired from his job with the University because of his military status with the Alaska Air National Guard in violation of USERRA.

[3] 38 U.S.C. § 4323(b)(2)

USERRA does not create an express cause of action against individual state supervisors; and (3) USERRA does not create an implied cause of action against individual state supervisors.

The Ninth Circuit gave credence to the Respondent's arguments regarding the Eleventh Amendment's sovereign immunity provisions while denouncing the Petitioner's argument that Congress intended to abrogate the states' sovereign immunity for purposes of enforcing the provisions of USERRA. Pet. App. 28-A. The Court stated specifically,

> Although Congress may abrogate the states' sovereign immunity when Congress has unequivocally expresse[d] its intent to abrogate the immunity, and when Congress has acted 'pursuant to a valid exercise of power, (citations omitted) here, Congress has not unequivocally expressed an intent to abrogate the states' sovereign immunity in USERRA. The best Townsend can point to is the language in the Act that claims against a state "may" be brought in state court.

Id.

Although The Ninth Circuit acknowledged that the language of 38 U.S.C. § 4323(b)(2) is permissive, they held that such language is not equivocal enough to abrogate sovereign immunity, and thus excepted the University of Alaska, as well as all state-employers, within the boundaries of the Ninth Circuit from the provisions of USERRA.

REASONS FOR GRANTING THE PETITION

This matter is of great national importance. The just resolution of this case is fundamental to the enforcement and preservation of USERRA, which was designed to encourage non-career military service and thus strengthen our nation's military defense capabilities. Now that the force-projection of the United States is subject to intense national debate and the numbers of voluntary military enlistments are not assured, proper enforcement of USERRA is critical. However, the Ninth Circuit's refusal to hear the claims of private persons against state-employers allows such employers to freely discriminate against U.S. servicemen and women as they attempt to reenter the civilian workforce.

Furthermore, the Ninth Circuit's holding puts non-career servicemen and women's civilian jobs at even greater risk by limiting the remedies under USERRA for unlawful discharge. Ultimately, the ruling discourages the non-career military service of anyone currently or potentially employed by the state or any "arm of the state." This result is in direct contradiction of one of the stated goals of USERRA, which is to encourage military service. 38 U.S.C. §4301 (a)(1). As a simple matter of national security, the Petitioner's Writ of Certiorari should be granted.

I. THIS CASE RAISES THE CRITICALLY IMPORTANT QUESTION OF WHETHER CONGRESS INTENDED TO PROVIDE A RIGHT OF ACTION IN FEDERAL DISTRICT COURT FOR USERRA ACTIONS BROUGHT BY PRIVATE PERSONS AGAINST STATE EMPLOYERS OR WHETHER SUCH ACTIONS

ARE BARRED BY THE ELEVENTH AMENDMENT'S SOVEREIGN IMMUNITY PROVISIONS.

There is a pressing need for this Court to determine whether men and women serving in the Armed Forces of the United States have any right of action in federal district court against state employers under USERRA as well as the extent to which the Eleventh Amendment's Sovereign Immunity powers can be abrogated by USERRA pursuant to Congress' Article I War Powers. Due to conflicting case-law regarding changes made to USERRA in 1998, the answer to this question remains unclear under as the rights of U.S. servicemen and women hang in the balance.

II. DESPITE THE 1998 USERRA AMENDMENT, THERE IS FEDERAL JURISDICTION FOR A PRIVATE USERRA CLAIM AGAINST A STATE EMPLOYER.

The Ninth Circuit held that a 1998 amendment to USERRA deprives the federal courts jurisdiction over a particular class of USERRA claims, claims by individuals against states as employers. Pet. App. 28 A. As will be seen in detail herein, this conclusion fails because conflicting Supreme Court opinions have held that, contrary to the case law relied upon by Ninth Circuit, a grant of jurisdiction to state courts framed such that a plaintiff "may" bring or maintain a suit in state court does *not* grant *exclusive* jurisdiction to the state courts. Rather, general federal question or federal diversity jurisdiction statutes are still applicable to the matter. In this instance, the general federal question, or more correctly, "arising under"

jurisdictional statute, 28 U.S.C. §1331, therefore supports the maintenance by this Honorable Court of jurisdiction over this matter.

A. The Relevant Statutory Texts – Pre- and Post-1998 Revision

The starting point for an analysis of the jurisdictional issues presented in this matter is, of course, the statutory language. Prior to the 1998 revision of USERRA, the relevant portion of the statute provided:

> (b) **In the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function.** In the case of a private employer the appropriate district court is the district court for any district in which the private employer of the person maintains a place of business.
>
> **(c)(1)(A) The district courts of the United States shall have jurisdiction, upon the filing of a complaint, motion, petition, or other appropriate pleading by or on behalf of the person claiming a right or benefit under this chapter--**
>
> (i) to require the employer to comply with the provisions of this chapter;
>
> (ii) to require the employer to compensate the person for any loss of

wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter; and

(iii) to require the employer to pay the person an amount equal to the amount referred to in clause (ii) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

38 U.S.C. §4323 (Pre-1998 amendment) (bold emphasis added).

The relevant portion of USERRA after the 1998 revision provides:

(b) **Jurisdiction.**--(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

38 U.S.C. §4323 (Post-1998 amendment, current law) (bold emphasis added)

One critical point must be noted from the plain statutory text, and that is the statutory contraposition of the word "shall" in 38 U.S.C. §4323(b)(1) and (3) with the word "may" in 38 U.S.C. §4323(b)(2).

B. THE NINTH CIRCUIT'S JURISDICTIONAL CONCLUSION

At the heart of Ninth Circuit's is a simple proposition. Prior to the revision it was clear that all suits against states under USERRA, whether brought by an individual or by the government were to be brought in federal court because of the mandatory provision that, "district courts of the United States *shall* have jurisdiction . . . . " 38 U.S.C. §4323(c)(1)(a) (Pre-1998 amendment). According to the Ninth Circuit, when the statute was amended to provide that when a private person sues a State to assert a USERRA claim, "the action *may* be brought in a State court of competent jurisdiction in accordance with the laws of the State[,]" this amended provision gave exclusive jurisdiction over such claims to state courts.

The Ninth Circuit stated, "[W]e conclude that the district court correctly dismissed Townsend's suit against the State for lack of subject matter jurisdiction. Indeed, not only has Congress failed to evince an intent to abrogate the states' sovereign immunity, 'Congress's intention to limit USERRA suits against states to state courts is unmistakable.'" (quoting Velasquez v. Frapwell, 165 F.3d 593, 594 (7th Cir.1999) (per curiam)). Pet. App. 30-A.

The Valasquez per curiam opinion cited considered the matter in a very conclusory way, as

might be expected in a per curiam opinion. The per curiam opinion partially vacated the same court's earlier opinion as to Eleventh Amendment sovereign immunity on the grounds that the statutory revision deprived the court of jurisdiction to consider the matter. The relevant portion of the Valesquez per curiam opinion holds that:

> The amendment to USERRA, so far as bears on this case, adds a new section conferring only on state courts jurisdiction over suits against a state employer, 38 U.S.C. § 4323(b), and makes the new jurisdictional provision applicable to pending cases, Pub.L. No. 105-368, § 211(b)(1), and hence to this case. The defendants argue that jurisdiction continues in the federal courts under the general federal question jurisdictional statute, 28 U.S.C. § 1331, which section 211 of the statute amending USERRA does not purport to repeal. The argument has no merit; Congress's intention to limit USERRA suits against states to state courts is unmistakable; the defendant's arguments that this case was finally decided because the district court issued a final decision and so the amendment is inapplicable, and that if it is applicable it is unconstitutional, also plainly lack merit.
>
> We conclude that we lacked jurisdiction over the plaintiff's USERRA claim, though not over his other claim, which

> is under Title VII of the Civil Rights Act of 1974. We therefore vacate so much of our decision as relates to the state's Eleventh Amendment defense and, as is customary, United States v. Munsingwear, 340 U.S. 36, 41, 71 S.Ct. 104, 95 L.Ed. 36 (1950), we also vacate the relevant ruling by the district court.

Id. at 593-594.

C. TEXTUALLY, THE STATUTORY LANGUAGE DOES NOT SUPPORT THE NINTH CIRCUIT'S CONCLUSION

The Ninth Circuit, in its ruling, relied upon Williams v. United Airlines, Inc., 2007 WL 2458504 (9th Cir. Aug. 31, 2007) for the proposition that a statutory provision that a person "may" file a complaint with the Secretary of Labor is mandatory, and excludes the possibility of the complaining party under the WPP simply filing suit in federal court. Unlike the statute under examination in the present matter, however, the statute in Williams neither creates any private cause of action for relief in federal or state court, nor does it not contain "may" in contraposition to two uses of the word "shall." 49 U.S.C. §42121. Rather, this statutory provision provides a very detailed scheme for admistrative complaint, administrative remedies (including a corrective order by the Secretary of Labor), and only a private cause of action for enforcement of the Secretary of Labor's order should it not be heeded. Id. By way of comparison, it is clear that USERRA intends for individuals to have direct access to the courts for relief, the only question is whether an

individual may pursue their private right of action against a state entity in federal court.

The Ninth Circuit rejected Petitioner's argument that the permissive language regarding state jurisdiction in such cases means that Congress also intended to grant federal jurisdiction,

> In Williams v. United Airlines, Inc., 500 F.3d 1019, 1022 (9th Cir.2007), we concluded that a statute stating that a person "may" file an administrative complaint with the Secretary of Labor did not mean that a complaint could be filed with the Secretary of Labor and with the federal district court. And in Murphey v. Lanier, 204 F.3d 911, 914 (9th Cir.2000), we held that because federal jurisdiction is limited to that conferred by Congress, a statute stating that an action "may" brought in state court "does not mean that federal jurisdiction also exists; instead, the failure to provide for federal jurisdiction indicates that there is none." Thus, Congress' use of the permissive "may" with respect to bringing suit in some other forum does not evince an intent to grant federal jurisdiction over actions brought by individuals against states, and it certainly does not evince an intent to abrogate the states' sovereign immunity.

Pet. App. 32-A (quoting Dellmuth v. Muth, 491 U.S. 223, 230, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989)).

There is, *however*, a firm basis for federal jurisdiction over any case arising under a federal statute, such that there is more than just the absence of a grant of jurisdiction contained in 28 U.S.C. § 1331. There is, significantly, a mandate by Congress that federal statutory matters be heard in federal court. That authority is, of course, that, federal courts have a duty to adjudicate the cases and controversies before them and a "virtually unflagging duty" to exercise federal jurisdiction when it exists. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)

Furthermore, there is a significant body of Supreme Court case law supporting the notion that the word "may" in this instance is not mandatory, but is permissive. In particular, interpreting the word "may" in statutory language as being discretionary, not mandatory, is appropriate when, as is the case in the present matter, it is found in close proximity to other clauses containing the word "shall". The Supreme Court has held that, "The word "may" customarily connotes discretion. That connotation is particularly apt where, as here, "may" is used contraposition to the word "shall[.]"" Jama v. ICE, 543 U.S. 335, 125 S.Ct. 694, 703, 160 L.Ed.2d 708 (2005) (internal citation omitted); see also, Martin v. Franklin Capital Corp., 546 U.S. 132, 126 S.Ct. 704, 708-709, 163 L.Ed.2d 547 (2005) (the word "may" connotes discretion where the statute has in other instances used the word "shall"), Lopez v. Davis, 531 U.S. 230, 241, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001) (reasoning that "Congress' use of the permissive 'may' in one section contrasts with the

legislators' use of a mandatory 'shall' in the same section").

In the present version of the statute the use of the word "may" is in perfect contraposition to the two bracketing clauses containing the mandatory "shall". Following the Supreme Court's holding in, the only logical conclusion is that the "may" contained in the current version of 28 U.S.C. 4323(b)(2) is merely discretionary, such that the plaintiff could have brought his suit in state court if he so elected, but does not serve to require that the plaintiff bring his claim in state court.

D. More Recent Supreme Court Case Law Has Clarified That Grants Of Jurisdiction Containing "May" Are Discretionary, Not Mandatory

Well after the per curiam decision in Valesquez that underlies the Ninth Circuit's decision in this matter, the very same circuit, the Seventh Circuit, considered the subsequent development of the law concerning grants of jurisdiction to state courts in federal statutory clauses containing the word "may." Moreover, in its later opinion the Seventh Circuit considered the impact of a later Supreme Court case, Breur v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 123 S.Ct. 1882, 155 L.Ed.2d 923 (2003). It is important to note that Breur was rendered after the Ninth Circuit TCPA case relied upon by the defendants below, Murphey v. Lanier, 204 F.3d 911 (9th Cir. 2000), for the proposition that statutory language that a plaintiff "may" pursue a claim in state court precludes federal jurisdiction.

In Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005), the court considered whether federal jurisdiction existed for a private

claim brought under the Telephone Consumer Protection Act. The Seventh Circuit's in depth consideration of the matter is worth quoting at length as it is directly applicable to the present matter:

That the controversy exceeds $5 million is insufficient, however, if state courts have exclusive jurisdiction to resolve suits under the Telephone Consumer Protection Act. The district judge relied on § 227(b)(3), which provides:

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State-
(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
(C) both such actions.
If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

This is the only portion of § 227 that expressly creates a private right of action, and from its failure to authorize litigation in federal court the district judge inferred that state jurisdiction must be exclusive. Six courts of appeals have come to similar conclusions-though they deal only with the question

whether suit to enforce the Telephone Consumer Protection Act may be filed or removed under the federal-question jurisdiction, see 28 U.S.C. § 1331, and not whether such a suit may be removed under the diversity jurisdiction. See Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd., 156 F.3d 432 (2d Cir.1998); ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3d Cir.1998); International Science & Technology Institute, Inc. v. Inacom Communications, Inc., 106 F.3d 1146 (4th Cir.1997); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507 (5th Cir.1997); Murphey v. Lanier, 204 F.3d 911 (9th Cir.2000); Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287 (11th Cir.1998). But if state jurisdiction really is "exclusive," then it knocks out § 1332 as well as § 1331.

These decisions can not be reconciled with either Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, --- U.S. ----, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005), or Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 123 S.Ct. 1882, 155 L.Ed.2d 923 (2003), both of which came after all of the six decisions to which we have referred. Grable resolved a conflict in the Supreme Court's own decisions by holding that federal jurisdiction does not depend on the existence of a private right of action under federal law. And Breuer held that statutory permission to litigate a federal claim in state court does not foreclose removal under the federal-question jurisdiction.

The Fair Labor Standards Act provides that a plaintiff may "maintain" an action in either state or federal court, and Breuer insisted that a right to "maintain" an action in state court forecloses its

removal. The Justices concluded, however, that a plaintiff's right to litigate in state court does not block a defendant from electing a federal forum, because 28 U.S.C. § 1441(a), the general removal provision, allows the defendant to remove any claim under federal law (or supported by diversity of citizenship) "[e]xcept as otherwise expressly provided by Act of Congress". The word "maintain" in the FLSA is not an "express" prohibition on removal, Breuer held.

Brill, 427 F.3d at 449-450 (bold emphasis added).

The Seventh Circuit goes on to note the similar role of contraposition between mandatory and permissive clauses in Brill as follows:

Section 227(b)(3) does not say that state jurisdiction is "exclusive"-but another part of § 227 does use that word. Section 227(f)(1) permits the states themselves to bring actions based on a pattern or practice of violations. Section 227(f)(2) continues: "The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection." How strange it would be to make federal courts the exclusive forum for suits by the states, while making state courts the exclusive forum for suits by private plaintiffs. But then § 227(f)(2) is explicit about exclusivity, while § 227(b)(3) is not; the natural inference is that the state forum mentioned in § 227(b)(3) is optional rather than mandatory. Likewise the proviso that actions may be filed in state court "if otherwise permitted by the laws or rules of court of a State"

implies that federal jurisdiction under § 1331 or § 1332 is available; otherwise where would victims go if a state elected not to entertain these suits? Our point is not that the reference to exclusive jurisdiction in § 227(f)(2) shows that "Congress knows how" to limit litigation to one set of courts-references to the subjective knowledge of a body with two chambers and 535 members, and thus without a mind, rarely facilitate interpretation-but that differences in language within a single enactment imply differences in meaning as an objective matter. See Akhil Reed Amar, Intratextualism, 112 Harv. L.Rev. 747 (1999). The contrast between § 227(f)(2) and § 227(b)(3) is baffling unless one provides exclusivity and the other doesn't.

Brill, 427 F.3d at 451 (bold emphasis added).

The logic of the Seventh Circuit in Brill is clear, and is in accord with the textual analysis of the statute that the amendment simply provides another forum option for a plaintiff without affecting the general rules of federal jurisdiction. As noted by the Supreme Court with regard to the Fair Labor Standards Act, and after examining a variety of exclusive jurisdiction provisions, in Breur v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 123 S.Ct. 1882, 155 L.Ed.2d 923 (2003), and equally applicable to the present matter:

When Congress has "wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms" It has not done so here.

Id., 123 S.Ct. at 1885-1886.

Considering the foregoing, plaintiff respectfully submits that it is clear that his claim is one for relief pursuant to USERRA, a federal statute. Congress authorized jurisdiction in federal district courts "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Thus, the federal courts properly have jurisdiction over this matter.

The District Court, in a footnote to its opinion, took a narrow view of Breur, describing it as inapposite. The legal analogy to the present matter, however, whether a permissive "may" in favor of state court in a federal jurisdictional provision is mandatory is both simple and clear. Additionally, the District Court completely ignored the explanation and application of Breur in Brill.

That plaintiff has elected not to bring his suit in state court is his right, but it does not defeat federal jurisdiction. The defendants' arguments are, without substance in that they are based on a per curiam opinion that gives no analysis. Moreover, the very same circuit which issued the opinion at the root of defendants' argument has subsequently recognized that the Supreme Court has reached the opposite conclusion in analogous cases concerning federal jurisdiction. Therefore, the plaintiff respectfully urges the Court to find that federal jurisdiction has been established in this matter.

E. The Eleventh Amendment Does Not Bar a USERRA Claim.

Although not reached by the District Court, the defendants urged that the plaintiffs claims are

barred by the Eleventh Amendment. In making this argument the defendants relied on two sources of authority.

First, the primary authority relied upon by the defendants is the original, now partially vacated, opinion in Valasquez v. Frapwell, 160 F.3d 389 (7th Cir. 1998), vacated in part, 165 F.3d 593 (1999). In any event, it should be noted that the very portion of the opinion relied upon by defendants for support of their Eleventh Amendment sovereign immunity argument is no longer valid law according to the very court which issued the opinion. Second, the defendants also relied on the Supreme Court's holding in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) that Congress could not regulate Indian Gaming pursuant to its Article I powers. Seminole in no way addressed Congress's Article I War Powers.

Contrary to Seminole Tribe, in Alden v. Maine, 527 U.S. 706 (1999), the Court held that what is known as Eleventh Amendment immunity is actually a preexisting fundamental aspect of the states pre-ratification sovereignty, subject to alteration by the "plan of the [Constitutional] Convention or certain constitutional Amendments. Id. at 713. The logical extension of the Alden Court's conclusion was that, contrary to the Court's dicta in Seminole Tribe, Article I powers could in fact abrogate sovereign immunity: "In exercising its Article I powers Congress may subject the States to privates suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to Constitutional design." See Id. at 730-31.

In 2006 in Central Virginia Community College v. Katz, 546 U.S. 356 (2006), specifically held that Congress could abrogate sovereign immunity pursuant to its Article I powers, holding that the Article I, §8 Bankruptcy Clause represents one such power. In doing so, the Court retracted its Seminole Tribe reasoning completely, stating:

> We acknowledge that statements in both the majority and the dissenting opinions in Seminole Tribe reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. Careful study and reflection have convinced us, however, that that assumption was erroneous. For the reasons stated by Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257 (1821), we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.

See Katz, 546 U.S. at 363.

Following the Court's reasoning in Alden that "limits implicit in the constitutional principle of sovereign immunity strike the proper balance between the supremacy of federal law and the separate sovereignty of the States," see Alden, 527 U.S. at 710, the Katz Court opened a clear avenue to overcome state assertions of sovereign immunity pursuant to Article I powers, on the basis of implied waiver. Under the newly articulated standard, waiver of sovereign immunity need not be as explicit as consent, nor must Congress even expressly abrogate state immunity.

Like the Bankruptcy Clause at issue in Katz, it is also appropriate to presume that the Framers of the

Constitution were familiar with the contemporary legal context when the war powers clauses were adopted. The Katz Court emphasized that the need for uniformity in bankruptcy was the historical basis upon which the Bankruptcy Clause was adopted, indicating the States' waiver of immunity in that arena. See Id. at 366, 368. Similarly, it has long been held that "the common defense was one of the purposes for which the people ordained and established the Constitution [such that] we need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws, by armed citizens." See United States v. Macintosh, 283 U.S. 605, 620 (1931), thus furnishing a similar basis upon which States' should be deemed to have waived immunity in the war powers context.

Finally, the principle that Congress' war powers were intended to be complete and absolute when written into the Constitution has long been recognized by the Supreme Court, another indication that States' waived their immunity when the war powers were ratified:

Whatever tends to lessen the willingness of citizen to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government ... The Constitution, therefore, wisely contemplating the ever-present possibility of war, declares that one of its purposes is to 'provide for the common defense.' In express terms Congress is empowered 'to declare war,' which necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and 'to raise armies' (Const. Art. 1 §8, cl. 11, 12), which necessarily connotes the like power to say who shall serve in them and in what way.

See Id. at 622.

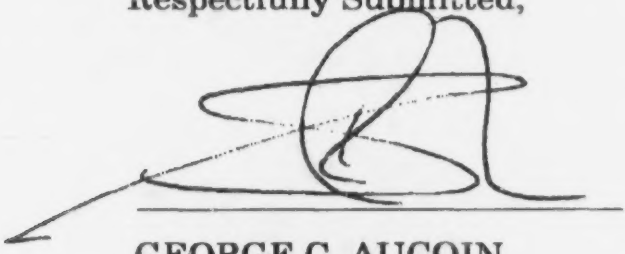
Thus, there is ample authority for the proposition that the Eleventh Amendment does not generally operate to bar the assertion of a USERRA claim against a state.

CONCLUSION

Mr. Townsend respectfully urges the Court to reverse the Ninth Circuit Court of Appeals and remand his case for further proceedings. The "may" term in the USERRA statute jurisdictional provision is permissive, particularly in light of its relationship to the two mandatory "shall" provisions that bracket it. Additionally, the District Court erred in denying the Motion for Leave to File the First Supplemental and Amending Complaint. The proposed amended pleading would have named Mr. Townsend's individual supervisors. USERRA is unique among federal employment statutes in allowing for suits against individual supervisors. The only other court to consider whether suits against individual supervisor defendants of a state employee when the state could not be sued in federal court held that they could. In sum, this approach does not do violence to the statute. Rather, it maximizes the chance that a servicemember can seek relief for discrimination against him on the basis of his military service. Underlying all of this case is the public policy in favor of supporting our military servicemembers in time of war. This policy is perhaps the most

important reason for allowing this suit to proceed in Mr. Townsend's chosen forum, federal court.

Respectfully Submitted,



GEORGE C. AUCOIN
La. Bar No. 24747
Law Offices of George C. Aucoin, APLC
3500 N. Hullen Street
Metairie, LA 70002
Telephone: (985) 727-2263
Fax: 951.7490

APPENDIX - A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT DAVID TOWNSEND,
Plaintiff-Appellant,

v.

UNIVERSITY OF ALASKA;
UNIVERSITY OF ALASKA AT
FAIRBANKS,
Defendants-Appellees.

No. 07-35993
D.C. No.
CV 06-0171 TMB
OPINION

Appeal from the United States District Court
for the District of Alaska
Timothy M. Burgess, District Judge, Presiding

Argued and Submitted
August 7, 2008 – Anchorage, Alaska

Filed September 5, 2008

Before: Dorothy W. Nelson, A. Wallace Tashima, and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Tashima

COUNSEL

Donald L. Hyatt, II, New Orleans, Louisiana, for the plaintiff-appellant.

William B. Schendel, Fairbanks, Alaska, for the defendants-appellees.

OPINION

TASHIMA, Circuit Judge:

Robert David Townsend sued his former employer, the University of Alaska, Fairbanks, in federal district court, alleging violations of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or the "Act"), 38 U.S.C. §§ 4301-4333. The district court dismissed his action, concluding that it lacked jurisdiction over a USERRA claim brought by an individual against an arm of the state. The district court also denied Townsend's motion to amend his complaint to add individual state supervisors as defendants, reasoning that such an amendment would be futile because the court would still lack jurisdiction over the amended complaint. Townsend timely appealed.

We must decide whether a federal district court has jurisdiction over an USERRA action brought by an individual against an arm of a state, and whether USERRA creates a private right of action against individual state supervisors. We hold that a federal district court lacks jurisdiction over a USERRA action brought by an individual against a state and that USERRA does not create a cause of action against state employee-supervisors. We thus affirm the district court.

I. JURISDICTION

The district court dismissed this action for lack of jurisdiction. Whether that dismissal was proper is the primary issue on appeal. The district court, of course, had jurisdiction to determine whether it has jurisdiction. *See, e.g., Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804). We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. BACKGROUND

Townsend commenced this action in federal district court against his former employer, the University of Alaska ("State" or "University"), alleging violations of USERRA. Townsend alleged that he was fired from his job with the University because of his military status with the Alaska Air National Guard in violation of USERRA. Townsend invoked the district court's jurisdiction pursuant to 38 U.S.C. § 4323(b)(3), which provides that "[i]n the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action." It is undisputed that the University is an arm of the State of Alaska.

The State moved to dismiss, contending that the federal district court lacked subject matter jurisdiction over Townsend's USERRA claim. The State argued that the Act's provision that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State," 38 U.S.C. § 4323(b)(2), means that the federal district court lacks jurisdiction over a USERRA claim against a "State (as an employer)" brought by a private individual. The district court granted the State's motion and dismissed the case for lack of jurisdiction.

Townsend then moved to amend his complaint to include individual supervisors as additional defendants. The district court denied leave to amend, reasoning that such an amendment would be futile because jurisdiction would still be lacking after concluding that USERRA does not create a cause of action against individual state supervisors.

Townsend timely appeals both the dismissal and the denial of leave to amend.

III. STANDARD OF REVIEW

The existence of subject matter jurisdiction is a question of law we review *de novo*. *See, e.g., United Transp. Union v. Burlington N. Santa Fe R.R. Co.*, 528 F.3d 674, 677 (9th Cir. 2008). Our review of whether a statute creates a private cause of action is also *de novo*. *See Crow Tribe of Indians v. Camp-bell Farming Corp.*, 31 F.3d 768, 769 (9th Cir. 1994).

IV. ANALYSIS

A. Statutory Background

[1] USERRA forbids employment discrimination on the basis of membership in the armed forces. 38 U.S.C. §§ 4301(a)(3), 4311(a). An employer violates USERRA if an employee's membership or obligation for service in the military is a motivating factor in an employer's adverse employment action taken against the employee, unless the employer can prove that the action would have been taken in the absence of such membership or obligation. *See id.* § 4311(c)(1); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). To enforce it's provisions, USERRA authorizes private suits for damages or injunctive relief against the employer, including a state employer. 38 U.S.C. §§ 4303(4)(A)(iii), 4323(a)(2), (b)(2), (d)(3).

[2] Before the 1998 amendments to USERRA, the Act provided that "[t]he district courts of the United States shall have jurisdiction" over all USERRA actions, including those brought by a person against a State employer. See Pub. L. No. 103-353, § 2, 108 Stat. 3149, 3165 (1994), *amended by* Pub. L. No. 105-368, § 211(a), 112 Stat. 3315, 3329 (1998). The venue provision then provided that "[i]n the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function." *Id.*

[3] In 1998, Congress enacted the Veterans Programs Enhancement Act of 1998, making substantial changes to the jurisdiction and venue provisions of USERRA. The amended jurisdictional provision now provides that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State". 38 U.S.C. § 4323(b)(2). The amended Act provides for federal jurisdiction over "an action against a State (as an employer) or a private employer commenced by the United States," and "an action against a private employer by a person." *Id.* § 4323(b)(1), (3). In cases in which the Attorney General believes that a State has not complied with USERRA, the amended version provides that the United States can be substituted for an individual service member as the plaintiff in enforcement actions. *Id.* § 4323(a). The federal district court has jurisdiction over such an action. *Id.* § 4323(b)(1).

The venue provision was also amended. It now provides that "[i]n the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function." *Id.* § 4323(c)(1). "In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business." *Id.* § 4323(c)(2). The Act, as amended, includes no venue provision for an action by a private person against a State (as an employer).

[4] The legislative history of the 1998 amendments con-firms that Congress intended that actions brought by individuals against a state be commenced in state court. The underlying reason for these amendments was that Congress was concerned about the Supreme Court's then-recent decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In Seminole Tribe, the Court held that Congress may abrogate a state's sovereign immunity only when acting pursuant to it's powers under § 5 of the Fourteenth Amendment, and not when it is acting pursuant to it's Commerce Clause powers. *Id.* at 59, 72-73. Following *Seminole Tribe*, the validity of USER-RA's abrogation of state sovereign

immunity was in doubt. *See* 144 Cong. Rec. H1396-02, H1398 (daily ed. Mar. 24, 1998) (Statement of Rep. Evans) ("[S]everal courts have held the reasoning of the Seminole Tribe case precludes federal court jurisdiction of claims to enforce federal rights of State employees under the Uniformed Service Employment and Re-employment Rights Act (USERRA).").

H.R. 3213, the jurisdictional provisions of which survive in the current version of 38 U.S.C. § 4323, was introduced on the House floor on March 24, 1998. *See* 144 Cong. Rec. H1396-02 (1998); *see also* H.R. 3213, 105th Cong. (1998). The stated purpose of the bill was, in part, "to clarify enforcement of veterans" employment and reemployment rights with respect to a State as an employer." 144 Cong. Rec. at H1396; *see also* H.R. 3213. The summary of the bill in the Report of the House Committee on Veterans' Affairs provides further insight into Congress' intent:

> This bill would substitute the United States for an individual veteran as the plaintiff in enforcement actions in cases where the Attorney General believes that a State has not complied with USERRA. Since the Attorney General, through U.S. Attorneys, is already involved in enforcing this law, the enactment of H.R. 3213 will not impose any new duties on the Attorney General. *Individuals not represented by the Attorney General would be able to bring enforcement actions in state court.*

H.R. Rep. No. 105-448, at 2 (1998) (emphasis added), *available at* 1998 WL 117158.

[5] The House Report thus makes plain that the purpose of the bill was to solve the *Seminole Tribe* problem by: (1) substituting the United States for the service member in suits

brought against states in federal court;[1] and (2) directing actions brought by individual service members, who were not represented by the United States, to state court.[2] *See* H.R. Rep. No. 105-448, at 2-5 (discussing the problems created by *Seminole Tribe* for USERRA's enforcement scheme and the proposed solution); *see also* 144 Cong. Rec. at H1398 (statement of Rep. Quinn) ("This bill would substitute the United States for an individual veteran as the plaintiff in enforcement actions in cases where the Attorney General believes that a State has not complied with USERRA... Individuals not represented by the Attorney General would be able to bring enforcement actions in State court.") The legislative history is devoid of any statement or suggestion that Congress intended to authorize individuals to bring actions against states in federal court or to enact a cause of action against the employee's supervisors in their individual capacity.

B. Individual Claims Against a State

[6] Despite the structure of the 1998 amendments' remedial scheme and it's legislative history, Townsend contends that USERRA provides for federal court jurisdiction for an action brought by a private individual against the University. He argues that Congress intended to retain federal court jurisdiction over USERRA claims brought by private individuals against an arm of the State. The Eleventh Amendment, how-ever, bars federal jurisdiction over suits against an unconsenting state by its own citizens. *See Hans v. Louisiana,* 134 U.S. 1, 15 (1890); *accord Seminole Tribe*, 517 U.S. at 54.

---

1 An action by the United States against a state in federal court is not barred by the Eleventh Amendment. See United States v. Mississippi, 380 U.S. 128, 140-41 (1965).

2 Congress did not use the terms "must" or "shall" with respect to state court jurisdiction over USERRA claims for the apparent reason that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." Alden v. Maine, 527 U.S. 706, 712 (1999); cf. ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 516 (3d Cir. 1998) ("While state courts would have had jurisdiction over private [Telephone Consumers Protection Act] actions even if Congress had made no reference to state courts, we conclude that Congress referred these claims to state court as forcefully as it could, given the constitutional difficulties associated with Congress' mandating a resort to state courts.").

[7] Although Congress may abrogate the states' sovereign immunity when "Congress has 'unequivocally expresse[d] it's intent to abrogate the immunity," and when "Congress has acted 'pursuant to a valid exercise of power,'" *Seminole Tribe*, 517 U.S. at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)); *accord Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1184-85 (9th Cir. 2003), here, Congress has not unequivocally expressed an intent to abrogate the states' sovereign immunity in USERRA. The best Townsend can point to is the language in the Act that claims against a state "may" be brought in state court. *See* 38 U.S.C. § 4323(b)(2). Based on that language, Townsend argues that Congress impliedly intended to authorize private actions against states in federal court.

[8] We have, however, on at least two occasions, explicitly rejected the argument that permissive language regarding another forum's jurisdiction means that Congress also intended to grant federal jurisdiction. In *Williams v. United Airlines, Inc.*, 500 F.3d 1019, 1022 (9th Cir. 2007), we concluded that a statute stating that a person "may" file an administrative complaint with the Secretary of Labor did not mean that a complaint could be filed with the Secretary of Labor and with the federal district court. And in *Murphey v. Lanier*, 204 F.3d 911, 914 (9th Cir. 2000), we held that because federal jurisdiction is limited to that conferred by Congress, a statute stating that an action "may" brought in state court "does not mean that federal jurisdiction also exists; instead, the failure to provide for federal jurisdiction indicates that there is none." Thus, Congress' use of the permissive "may" with respect to bringing suit in some other forum does not evince an intent to grant federal jurisdiction over actions brought by individuals against states, and it certainly does not evince an intent to abrogate the states' sovereign immunity. *See Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("[E]vidence of congressional intent must be both unequivocal and textual."); *see also Seminole Tribe*, 517 U.S. at 55 ("Congress' intent to abrogate the States' immunity from suit must be obvious from a clear legislative statement.") (internal quotation marks and citations omitted).[3]

---

3 By way of contrast, the pre-1998 version of USERRA did evince a clear congressional intent to abrogate sovereign immunity. It provided that "[t]he district courts of the United States shall have jurisdiction" over all USERRA actions, including those brought by a person against a State

[9] Townsend also argues in passing that 28 U.S.C. § 1331, the general federal question jurisdictional statute, grants jurisdiction over USERRA claims brought against a state by an individual, and thereby evinces an intent to abrogate the states' sovereign immunity. Section 1331, however, "does not itself purport todirect federal courts to ignore a State's sovereign immunity." *Seminole Tribe*, 517 U.S. at 86 (Stevens, J., dissenting).

[10]Thus, we conclude that the district court correctly dismissed Townsend's suit against the State for lack of subject matter jurisdiction. Indeed, not only has Congress failed to evince an intent to abrogate the states' sovereign immunity, "Congress's intention to limit USERRA suits against states to state courts is unmistakable." *See Velasquez v. Frapwell*, 165 F.3d 593, 594 (7th Cir. 1999) (per curiam).[4]

C. Claims Against Individual Supervisors

[11]Next, Townsend contends that the district court erred in denying him leave to amend his complaint in order to name state employee-supervisors in their individual capacities as defendants. These individual defendants, according to Town-send, also violated his USERRA rights.[5] Federal Rule of Civil Procedure

---

employer. *See* Pub. L. No. 103-353 § 2, 108 Stat. 3149, 3165 (1994). But, as we have noted in Part IV.A, *supra*, concerned about the teaching of *Seminole Tribe*, Congress repealed that provision

4 The Fifth Circuit also recently held that the statute does not "allow[ ] individuals to bring USERRA claims against states as employers in federal court." *McIntosh v. Partridge*, 2008 WL 3198250, at *4 (5th Cir. Aug. 8, 2008). Although the suit was brought against an individual in both his individual and official capacities, *see id.* at *1, the court analyzed the case as if it were an action against the state and not an individual defendant.

5 If Townsend attempted to sue the state officials in their official capacity, he would still face the bar of sovereign immunity. The Eleventh Amendment's bar remains effective, if somewhat less absolute, in cases where state officials, instead of the State itself, are the subjects of suit. "Generally speaking, 'a suit [brought] against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.'" *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 952 (9th Cir.

15(a)(2) provides that leave to amend shall be freely granted "when justice so requires." Leave to amend need not be granted, however, where the amendment would be futile. Jackson v. Bank of Haw., 902 F.2d 1385, 1388 n.4 (9th Cir. 1990) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). We agree with the district court that the amendment would be futile, but for somewhat different

reasons that we discuss below. See Atel Fin. Corp. v. Quaker Coal Co., 321 F.3d 924, 926 (9th Cir. 2003) (per curiam) ("We may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt"). Section 4323 does not create either an express or implied cause of action against individual state supervisors.[6] Accordingly, Townsend's proposed amended complaint would still fail to state a claim against those defendants.

1. Express Cause of Action

[12]USERRA expressly creates only two private causes of action: (1) an action brought by an individual against a State (as an employer), which as we have noted, may be brought in state court; and (2) an action brought against a private employer, which may be brought in both state and federal court. See 38 U.S.C. § 4323(a)(2). Despite the plain text of the statute, Townsend argues that USERRA also creates a cause of action against the supervisors, because the Act defines "employer" to

---

2008) (alteration in the original and quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71(1989)).

6 The district court stated that the "naming of individual state employees does not cure the subject matter jurisdiction defect." (Emphasis added.) It is "firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction" under 28 U.S.C. § 1331. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998). Therefore, although we agree with the district court that USERRA does not create a cause of action against individual state supervisors, we do not view Townsend's proposed claim against them as so "wholly insubstantial and frivolous" or "foreclosed by prior decisions of this Court," see id., that federal question jurisdiction would not lie. The basis for futility is more accurately characterized as a failure to state a claim for relief, see Fed. R. Civ. P. 12(b)(6), than as a failure to invoke federal jurisdiction, see Fed. R. Civ. P. 12(b)(1).

include "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities," 38 U.S.C. § 4303(4)(A)(i) (emphasis added), and the supervisors are persons. The USERRA cause of action, however, arises against "a State (as an employer)." *See id.* § 4323(a)(2). Individual supervisors are not included in the definition of "State." *See id.* § 4303(14) (defining "State"). Although the cause of action can be brought against a "State (as an employer)," "as an employer" describes the capacity in which the State can be sued; it does not create a cause of action against individual state employees even if they exercise supervisory responsibility. Thus, an action under USERRA is

available only against the State "as an employer," and not in some other capacity. In any event, even if the individual supervisors are a "State (as an employer)," that action, as we have already noted, would be limited to state court. Thus, Townsend's attempt to sue individual supervisors under the cause of action which the Act provides against a "State (as an employer)" fails.

[13] Nor are the individual state supervisors "private employers." While the supervisors may fit under the definition of "employer," we agree with the district court that it would do violence to the language of the statute to consider a state employee-supervisor a "private employer."

2. Implied Cause of Action

[14]We next consider whether there is an implied private right of action against an individual state supervisor under USERRA. *See Williams*, 500 F.3d at 1022. To determine whether a private right of action is implied in a federal statute, we employ the four-factor test under *Cort v. Ash:*

First, is the plaintiff one of the class for whose especial benefit the statute was enacted-that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally

relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. 66, 78 (1975) (internal quotation marks and citations omitted).

The first factor weighs in favor of finding an implied cause of action: USERRA clearly creates federal rights for service members like Townsend. "However, 'even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private *right* but also a

private *remedy* [in federal court].'" *Williams*, 500 F.3d at 1023-24 (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002)).

[15]Given that cautionary note, the second factor, whether there is congressional intent to create a private right of action in federal court, is generally determinative. *See id.* (citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). Here, Congress manifested no intent to create a private right of action against state supervisors. Indeed, by designing such a detailed express remedial scheme, Congress evinced an intent *not* to create an additional individual cause of action against state supervisors. *Cf. Seminole Tribe*, 517 U.S. at 74 ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Exparte Young*."). And, as we have noted, nothing in the legislative history suggests an intent to create a cause of action against individual state supervisors.

[16]Thus, the structure of USERRA and its legislative history make plain that Congress did not intend to create a cause of action against state supervisors. We therefore conclude that the district court did not err in denying Townsend leave to amend his complaint because such an amendment would be futile.

V. CONCLUSION

Section 4323(b) plainly places private suits against the state in state court. And § 4323(b) certainly does not evince an

unequivocal intent to abrogate the states' sovereign immunity. Townsend's attempt to find implied concurrent jurisdiction in the "may" and "private employer" terminology falls far short, and his attempt to fashion a claim against individual state supervisors also fails.

The judgment of the district court is

AFFIRMED.

APPENDIX - B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP. 30, 2008

MOLLY C. DWYER,
CLERK OF COURT
U.S. COURT OF
APPEALS

ROBERT DAVID TOWNSEND,

Plaintiff – Appellant,

v.

UNIVERSITY OF ALASKA;
UNIVERSITY OF ALASKA AT
FAIRBANKS,

Defendants - Appellees

No. 07-35993
D.C. No. CV-06-00171-TMB
District of Alaska, Anchorage

MANDATE

The judgment of this Court, entered 9/5/08, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Lee-Ann Collins
Deputy Clerk

United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 09/30/2008 at 2:51:21 P.M. PDT and filed on 09/30/2008

Case Name: Townsend v. University of Alaska, et. al.

Case Number: 07-35993

Document(s): Document(s)

Docket Text:
MANDATE ISSUED (DWN, AWT and RCF)

The following document(s) are associated with this transaction:
Document Description: Mandate Letter
Original Filename:
opt/ACECF/live/forms/leeann_0735993_6661334_MandateForm_108.pdf
Electronic Document Stamp:
[STAMP acecf Stamp_ID=1106763461 [Date=09/30/2008] [File Number=6661334-0] [64ad6f9aaa7ea1b99f37d4deb6d2fe128314f90f5db3da4968cab2455b67fddb9e420b85c7cdfb77e5d5098]
Recipients:

- Ashburn, Mark E., Attorney
- Aucoin, George Colin, Attorney
- Hyatt, Donald L., II, Attorney
- Schendel, William
- USDC, Anchorage

Notice will be electronically mailed to:

Ashburn, Mark E., Attorney: mea@anchorlaw.com, jal@anchorlaw.com

Schendel, William: will@schendellaw.com, office@schendellaw.com

Notice Will be mailed to:

Aucoin, George Colin, Attorney
LAW OFFICES OF GEORGE C. AUCOIN, APLC
Ste. 25
2637 Florida St.
Mandeville, LA 70448

Hyatt, Donald L., II, Attorney
LAW OFFICES OF DONALD L. HYATT
Ste. 2960
1100 Poydras St.
New Orleans, LA 70163

USDC, Anchorage
District of Alaska (Anchorage)
222 West 7th Avenue
Anchorage, AK 99513-9513

The following information is for the use of court personnel:

DOCKET ENTRY ID: 6661334
RELIEF(S) DOCKETED:
DOCKET PART(S) ADDED: 5844408

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ROBERT DAVID TOWNSEND,

Plaintiff

vs.

UNIVERSITY OF ALASKA and UNIVERSITY OF ALASKA AT FAIRBANKS,

Defendants

Case No. 3:06-cv-000171 TMB

ORDER

I. MOTIONS PRESENTED

Plaintiff Robert David Townsend ("Townsend") has sued his former employer, alleging violations of the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 et. seq. ("USERRA"). Defendants have moved to dismiss Plaintiff's claims, and Plaintiff has responded by moving to amend his complaint. Both motions have been fully briefed, and the Court heard oral argument on February 20, 2007.

II. BACKGROUND

Plaintiff Townsend claims that he was fired from his job with the University of Alaska at Fairbanks based on his military status with the Alaska Air National Guard in violation of the USERRA, 38 U.S.C. § 4301 *et. seq.* The Court will not recite the facts underlying Plaintiff's claims, as they are not relevant to the motions under consideration. For purposes of Defendant's Motion to dismiss, the only relevant material facts are that Townsend sues on his own behalf, and that the Defendants University of

Alaska and University of Alaska at Fairbanks are instrumentalities of the state of Alaska.[1]

1 Defendants inform the Court that although Townsend separately names the University of Alaska and the University of Alaska Fairbanks as defendants, they are both the same legal entity. Nevertheless, since the issue has not been fully briefed and does not affect the Court's analysis, the Court will refer to the Defendants, plural, in accordance with Plaintiff's pleadings.

Defendants have moved to dismiss Plaintiff's complaint on two separate grounds: (1) that the Court lacks subject matter jurisdiction over a private USERRA lawsuit against an instrumentality of the State such as the University of Alaska, because USERRA grants exclusive jurisdiction over this case to the Alaska state courts; and (2) that as an instrumentality of the state of Alaska, the University has sovereign immunity from this lawsuit. Plaintiff contends both arguments are incorrect. In addition, Plaintiff has moved to amend his complaint to add certain individual defendants, which, in the event the Court were to accept Defendants arguments, Plaintiff says would cure the alleged defects in his complaint.

III. DISCUSSION

A. Defendants' Motion to Dismiss

The Court now considers Defendants' argument that Plaintiff's complaint should be dismissed for lack of subject matter jurisdiction. Because the Court finds that it lacks subject matter jurisdiction under USERRA, the Court will not address the question of sovereign immunity.

USERRA is a federal statute prohibiting discrimination against persons because of their service in the uniformed services.[2] The statute regulates both private and government employers.[3] It permits enforcement by either the service member or, upon application by the service member, by the Attorney General.[4] In this case, Townsend chose to prosecute the action against the Defendants himself. The parties agree that Defendants are instrumentalities of the state of Alaska. The question raised by Defendants' motion to dismiss is whether USERRA grants jurisdiction to the federal courts to hear all cases arising under it's regulations, or whether, as Defendants assert, USERRA actions by private individuals against a state may only be heard in state court.

No binding precedent exists on this precise question, since neither the U.S. Supreme Court nor the Ninth Circuit Court of

---

2 38 U.S.C. § 4301 (a)

3 38 U.S.C. § 4303 (4)(A)

4 38 U.S.C. § 4323 (4)(a)

Appeals have addressed this question. The only circuit court to consider the issue has agreed with Defendants' position and found that the federal district court lacked jurisdiction.[5] Two district courts have followed this decision, and Plaintiff admits that no court has agreed with it's position on this jurisdictional issue.[6] However, since none of these decisions constitute more than persuasive authority for this Court, the Court will enter into its own statutory analysis.[7]

USERRA was initially passed in 1994. As originally enacted, the jurisdictional section read as follows:

(b) In the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function. In the case of a private employer the appropriate district court is the district court for any district in which the private employer of the person maintains a place of business.

(c)(1)(A) The district courts of the United States shall have jurisdiction, upon the filing of a complaint, motion, petition, or

---

5 Velasquez v. Frapwell and Trustees of Indiana Univ., 165 F. 3d 593, 593-94 (7th Cir. 1999)(per curiam).

6 Valadez v. Regents of the Univ. of Cal., 2005 WL 1541086 (E.D. Cal. 2005); Larkins v. Department or Mental Health, State of Alabama, 1999 WL 33100500 (M.D. Ala. 1999)

7 Plaintiff argues that the persuasive precedent cited by Defendants is contradicted by more recent guidance from the Supreme Court in Breur v. Jim's Concrete of Brevard, Inc, 538 U.S. 691 (2003). Breur, however, is entirely inapposite. In Breur, the Court held that a provision of the Fair Labor Standards Act, that suit under the Act "may be maintained ... in any Federal or State court of competent jurisdiction," does not bar removal to federal court. Id at 593 (quoting 52 Stat. 1069, as amended, 29 U.S.C. § 216(b)). Based on this language, the Court began it's analysis by noting that "[t]here is no question that Breuer could have begun his action in the District Court." Id. The Fair Labor Standards Act explicitly gives plaintiffs the choice of federal or state court, and the only question before the Supreme Court was whether the statement that the action "may be maintained ... in any Federal or State court" meant that plaintiff who chose state court had a right to keep the action in state court even though removal would otherwise be permitted. In this context, the Court noted that "[w]hen Congress has wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms," and found that it has not done so here. Id at 697 (internal quotations and citations omitted).

other appropriate pleading by or on behalf of the person claiming a right or benefit under this chapter -

(I) to require the employer to comply with the provisions of this chapter;

(ii) to require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter; and

(iii) to require the employer to pay the person an amount equal to the amount referred to in clause (ii) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.[8]

Congress amended USERRA in 1998. As amended, USERRA now allocates court jurisdiction and assigns venue based on the kind of plaintiff and the kind of defendant. The Act provides as follows:

(2) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person—

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

(b) Jurisdiction. - **(1)** In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

(c) Venue.- (1) hi the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or caries out any function. 2) In the case of an action against a private employer the action may proceed in

---

8 Pub.L. 103-353, 108 Stat. 3165

the United States district court for any district in which the private employer of the person maintains a place of business.[9]

The parties agree that prior to the 1998 amendment a private plaintiff could sue a state defendant in federal court. Plaintiff argues that such is still the case after the 1998 amendment. He asserts that 38 U.S.C.A. § 4323(b)(2)'s permissive statement that "the action *may* be brought in a State court of competent jurisdiction in accordance with the laws of the State" indicates that private plaintiffs retain a choice of state versus federal court.[10] Defendants, however, argue persuasively that USERRA, in its current form, expressly provides for federal court jurisdiction only over cases brought by the United States and cases brought against private employers, and that federal jurisdiction is neither explicitly provided for, nor implied, in cases brought by private individuals against a state.

Under 28 U.S.C. § 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." "However, this general federal-question jurisdiction statute is applicable only when the plaintiff sues under a federal statute that creates a right of action in federal court."[11] The Ninth Circuit recently laid out the proper analysis in a similar case of statutory interpretation in the case of *Williams v. United Airlines, Inc.*[12] *In Williams,* the court was faced with interpreting the jurisdictional provisions of the federal Whistleblower Protection Program ("WPP"), enacted to protect airline employees who report airline safety issues.[13] The WPP, 49 U.S.C. § 49121, provides that an aggrieved employee *may* file a complaint with the Secretary of Labor, and that in the event of non-compliance with the Secretary's final order, either the Secretary or the employee may bring a civil action in a federal district court to compel

---

9 38 U.S.C.A. § 4323 (a)(2)-(c)(2)

10 38 U.S.C.A. § 4323(b)(2) (emphasis added).

11 *Williams v. United Airlines, Inc.*, – F. 3d – 2007 WL 2458504 *2 (9TH Cir. Aug. 31, 2007) (citing *Merrell Dow Pharms, Inc. v. Thompson*, 478 U.S. 804, 807-12(1986)),

12 *Id.*

13 *See id.* (citing 49 U.S.C. § 42121)

compliance with the order.[14] The administrative filing requirement in § 42121(b)(1) is phrased permissively: "A person who believes that he or she has been discharged or otherwise discriminated against ... may ... file ... a complaint with the Secretary of Labor alleging such discharge or discrimination."[15] Thus, the plaintiff argued, and the district court agreed, that because the statute stated that a person "may" file a complaint, exhaustion of administrative remedies was not required before bringing a suit in federal district court.[16] However, the Ninth Circuit disagreed, finding instead that the fact "[t]hat an aggrieved employee "may" file an administrative complaint with the Secretary of Labor under § 42121(b)(1) does not, by itself, imply that jurisdiction is also authorized in federal district courts.[17]" The court explained that there is no presumption of federal jurisdiction:

---

14 49 U.S.C. § 42121

15 49 U.S.C. § 42121(b)(1) (emphasis added).

16 Williams, 2007 WL 2458504 at *2

17 Id. The Third Circuit's opinion in ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d at 516, cited approvingly by the Ninth Circuit, provides an even more direct repudiation of the type of statutory interpretation argument that Plaintiff has put forth regarding USERRA. Like Townsend, the plaintiff in ErieNet argued a statute - in this case, the Telephone Consumer Protection Act ("TCPA") - that stated that actions "may" be brought in state court implied, by its permissive language, that actions could also be brought in federal court. However, the Third Circuit disagreed:

The permissive authorization of jurisdiction in state courts does not imply that jurisdiction is also authorized in federal courts. For Congress' reference to state courts to have any meaning, it must reflect something other than a mere confirmation of concurrent jurisdiction over private enforcement actions. We believe that the most natural reading of this language is that Congress intended to authorize private causes of action only in state courts, and to withhold federal jurisdiction.

Id at 156 F.3d at 517. The Fourth Circuit has also rejected a federal jurisdiction argument based on the permissive language granting state court jurisdiction over TCPA actions. Like the Third Circuit, the Fourth Circuit concluded that "[i]f a statute authorizes suit in state courts of general jurisdiction through the use of the term "may," that authorization cannot confer jurisdiction on a federal court because federal courts are competent to hear only those cases specifically authorized." International Science & Tech. Inst., Inc. v. Inacom Commc'ns, Inc., 106 F.3d 1146, 1151-52 (4th Cir. 1997) (citing Sheldon v. Sill, 49 U.S. 441, 449 (1850)).

As the Supreme Court has often repeated, "[f]ederal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Art. III § 2, cl. 1 [of the United States Constitution]. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction." *Ins. Corp. of Ir.*, 456 U.S. at 701.

On this point, *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F. 3d 513, 516 (3d Cir. 1998), is instructive. *ErieNet* involved a class action suit under the Telephone Consumer Protection Act, which provides that "[a] person or entity may... bring in an appropriate court of that State... an action based on a violation of this subsection." 47 U.S.C. § 227(b)(3) (emphasis added). The class members argued that Congress's use of the word "may" indicated that the statute did not limit jurisdiction to state courts. *ErieNet*, 156 F. 3d at 516. The Third Circuit rejected this argument, explaining that "[t]he appellants' argument that the permissive reference to state courts implies the existence of federal jurisdiction is undercut by the fact that there is no presumption of jurisdiction in the federal courts." *Id.* (citing *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 12 L.Ed. 1147 (1850)).[18]

Guided by the Ninth Circuit's analysis in Williams, the Court has little difficulty concluding that USERRA does not expressly grant Plaintiff a right of action in federal district court.

Because USERRA does not expressly grant Plaintiff a federal right of action, the Court must consider whether there is an implied right of action under the statute.[19] The Ninth Circuit has followed the Supreme Court's decision in Cort v. Ash, which announced four factors to consider when deciding whether a private right of action is implicit in a federal statute:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted-that is, does the statue create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the

---

18 Id.

19 Id at *3.

> legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[20]

However, the Ninth Circuit has also noted that "[s]ince *Cort*, the Supreme Court has focused on the second Cort factor – whether there is congressional intent to create a private right of action.[21]

Here there is no doubt that Townsend is a member of the special class the statute was meant to protect.[22] However, the Court finds no evidence that the statute was intended to create a right of action in federal court for private individuals suing state employers. Plaintiff argues that the provision addressing actions brought by persons against a state, at 38 U.S.C.A. § 4323(b)(2), that "the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State" should be read as additional to jurisdiction already impliedly granted to the federal courts. However, in it's 1998 amendment to USERRA, Congress did not simply add a provision granting jurisdiction to the state courts; it also removed the express grant of federal jurisdiction for private cases against state employers. Moreover, as the Ninth, Third and Fourth Circuits have pointed out, Plaintiffs interpretation would in fact nullify any effect the provision could have, since the state courts are courts of plenary jurisdiction, which already have concurrent jurisdiction to

---

20 Id. (quoting Cort v. Ash, 422 U.S. 66, 78 (1975) (Internal quotations and citations omitted)).

21 21 Id. (citing Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (stating that "[s]tatutory intent ... is determinative."); Love v. Delta Air Lines, 310 F.3d 1347, 1351-52 (11th Cir. 2002) (explaining that since the late 1970s, the Supreme Court has "gradually receded from it's reliance on three of these four factors, focusing exclusively on legislative intent"); Thompson v. Thompson, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) (arguing that Touche Ross & Co. v. Redington, 442 U.S. 560, 575-576 (1979), and Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979), effectively overruled Cort).

22 See 38 U.S.C. § 4301(a) ("The purposes of this chapter are - (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service ...").

entertain actions under a federal statute such as USERRA.[23] Finally, the current version of the statute specifically addresses venue within the federal district courts for cases brought by the United States and for all cases brought against private employers, but includes no provision for cases brought by private persons against a state employer.[24] In light of the foregoing, and in accordance with the other courts that have considered the issue, the Court finds that Congress did not intend to provide a right of action in federal district court for USERRA actions brought by private persons against a state employer.[25]

Because Congressional intent is clear, the Court need not address the third and fourth factors in the *Cort* analysis.[26]

B. Plaintiff's Motion to Amend

Plaintiff has moved to amend his complaint by including additional individual defendants, who Plaintiff claims were the decision makers who acted to terminate or otherwise discriminate against Plaintiff on the basis of his military status. Federal Rule of Civil Procedure 15(a) provides that a trial court shall freely grant leave to amend "when justice so requires." When an amendment may serve to cure purported deficiencies in the plaintiff's pleadings, leave should be granted unless amendment

---

23 See supra at note 17 and accompanying text.

24 (c) Venue.--(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

38 U.S.C.A. § 4323 (c).

25 See Williams, 2007 WL 2458504 at *3 (citing Transamerica, 444 U.S. at 19 ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it"); Nat'l Railroad Passenger Corp. v. Nat'l Assn of R.R. Passengers, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.")).

26 Id.

would be futile.[27] In this case, the naming of individual state employees does not cure the subject matter jurisdiction defect. Thus, Plaintiff's motion to amend is futile and should be denied.

USERRA includes in it's definition of "employer" subject to suit for USERRA violations "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities."[28] Thus, Defendants do not dispute that USERRA provides a right of action against the individuals in question.

The question is whether individuals who are state supervisors, like those Plaintiff seeks to add in this case, are subject to suit in federal court.[29] USERRA clearly delineates two classes of defendants - state employers and private employers. The statute provides that "[a] person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer.[30] As discussed above, private actions "against a State (as an employer)" must be brought in state court, whereas actions "against a private employer" may be brought in federal court.[31] Plaintiff argues that the individual state supervisors whom he proposes to add to his complaint are not themselves the "State," and therefore, suit against them should not be limited to state court. However, the Court finds that this interpretation does less violence to the USERRA statutory scheme than the

---

27 See Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000).

28 38 U.S.C. § 4303(4).

29 No court has squarely addressed this question, as it appears no other USE plaintiff has ever tried to raise it. However, the only courts to have considered the subject matter jurisdiction issue in USERRA actions which included individual defendants have dismissed the actions in their entirety, including the claims against the individual defendants. In Velasquez, 165 F.3d at 593, the Seventh Circuit dismissed plaintiffs claims against both the individual defendant, Dorothy Frapwell, and the Trustees of Indiana University, also arguably private persons but treated by the court as an arm of the state of Indiana In Valadez, 2005 WL 1541086, the Eastern District of California followed Velasquez in dismissing a USERRA action against the Regents of the University of California. The primary case relied upon by Plaintiff is inapposite on this issue, since it was decided before the 1998 amendment. See Palmatier v. Michigan Dep't of State Police, 981 F. Supp. 529 (WD. Mich. 1997).

30 38 U.S.C. § 4323(A)(2).

31 38 U.S.C. § 4323(b)(2)-(3)

alternative - describing each of these individuals, themselves state employees, as a "private employer."

In this case, it is undisputed that Plaintiff's employer was the University of Alaska at Fairbanks, an instrumentality of the state of Alaska. Normally, one would say that an employee with one job has one employer, although that term might encompass the actual company or corporation that pays his paycheck as well as his direct supervisors. The definition of "employer" in USERRA functions similarly, lumping together all the relevant entities under the single umbrella of "employer." There is no indication that the statute contemplates an employee having multiple "employers" who would be separately subject to the statute's jurisdictional and venue requirements. Thus, the Court finds that, even with the addition of the individual state supervisors, Plaintiff's action would remain an action against a state employer, rather than a private employer, and jurisdiction would therefore lie only in the state courts.

IV. CONCLUSION

Having concluded that subject matter jurisdiction is lacking, the Court finds that Defendants' motion to dismiss must be granted. Furthermore, Plaintiff's motion to amend the complaint would be futile and should therefore be denied.

IT IS THEREFORE ORDERED:

The motion to dismiss at Docket No. 13 is GRANTED. Plaintiff's motion for leave to amend the complaint at Docket No. 20 is DENIED.

Dated at Anchorage, Alaska, this 10th day of October, 2007.

/s/Timothy Burgess

Timothy M. Burgess
United States District Judge

122

(2)

No. 08-973

In The Supreme Court of the United States

ROBERT DAVID TOWNSEND,
Petitioner,

v.

UNIVERSITY OF ALASKA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

MARK ASHBURN
ASHBURN & MASON, P.C.
1227 WEST NINTH AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
(907) 276-4331

WILLIAM B. SCHENDEL
Counsel of Record
SCHENDEL LAW OFFICE
250 CUSHMAN STREET
SUITE 500
FAIRBANKS, ALASKA 99701
(907) 451-6500

Counsel for Respondents

March 3, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Whether Townsend has presented a compelling reason for this Court to grant review of the Ninth Circuit's decision rejecting federal question jurisdiction over an employee's USERRA claim against a state employer, when that decision does not directly conflict with any decision of this Court or any federal court of appeals?

2. Whether Townsend has presented a compelling reason for this Court to grant review of the Ninth Circuit's decision affirming state immunity under the 11th Amendment from an employee's USERRA claim against a state employer, when that decision does not directly conflict with any decision of this Court or any federal court of appeals?

3. Whether Townsend has waived review of the Ninth Circuit's decision rejecting individual defendant liability under USERRA, when he failed to either raise the issue in his Questions Presented or brief the issue in the body of his Petition?

PARTIES TO THE PROCEEDING

Petitioner is Robert David Townsend.

Respondents are the University of Alaska; the University of Alaska Fairbanks; Mike Setterberg; Terry Vrabec; Carolyn Chapman; Mike Hostina; and Kathleen Schedler ("University").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

OPINIONS BELOW

The Court of Appeals opinion is reported at 543 F.3d 478 (9th Cir. 2008). The District Court's opinion is not officially reported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 over Townsend's appeal from the Court of Appeal's September 30, 2008, mandate arising from the September 5, 2008, opinion.

STATUTES INVOLVED

This case rests on an interpretation of the jurisdictional grant in 38 U.S.C. § 4323(b)(2).

STATEMENT OF THE CASE

A. Factual background[1]

During Townsend's employment at the Power Plant of the University of Alaska Fairbanks, he joined the Alaska Air National Guard and participated in several periods of active Guard duty. The University terminated his employment on October 9, 2003, for cause. Townsend contends that the University discriminated against him because of his military status and performance of his military duty.

---

[1] Because the district court dismissed the complaint on its face, this Court must assume Townsend's factual allegations to be accurate. *Bell-Atlantic Corp. v. Twombley*, 550 U.S. 544, ___, 127 S. Ct. 1955, 1964-65 (2007).

B. Proceedings below

Townsend filed suit in federal district court against the University, alleging violations of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Townsend alleged that the University terminated his employment because of his military status with the Alaska Air National Guard, in violation of USERRA. Townsend invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331 and 38 U.S.C. § 4323(b)(3), which provides that "[i]n the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action."[2] The University moved to dismiss, asserting lack of subject matter jurisdiction over Townsend's USERRA claim and 11th Amendment immunity. It argued that the Act's provision that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State," 38 U.S.C. § 4323(b)(2), means that the federal district court lacks jurisdiction over a USERRA claim against a "State (as an employer)" brought by a private individual.[3]

Townsend then moved to amend his complaint to include individual supervisors as additional defendants.

---

[2] Later, before the Ninth Circuit and now this Court, Townsend relied solely on federal question jurisdiction.

[3] The parties agree that the University is an arm of the State of Alaska under the 11th Amendment. Pet. at p. 5.

The district court granted the University's motion and dismissed the case for lack of jurisdiction. The court also denied leave to amend, reasoning that such an amendment would be futile because jurisdiction would still be lacking, after concluding that individual state supervisors were "the State" and thus, if suable at all, subject to state court jurisdiction.

On appeal, the Ninth Circuit affirmed, and held that (1) a federal district court lacks jurisdiction over a USERRA claim brought by an individual against a state, 543 F.3d at 482-85; (2) Congress has not abrogated the University's sovereign immunity, *id.*; and (3) USERRA does not create, expressly or implicitly, a cause of action against state employee-supervisors, *id.* at 485-87.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's opinion on the USERRA jurisdictional, immunity, and individual liability issues does not directly conflict with any decision of this Court or with that of any federal court of appeals.

On the merits of the jurisdictional issue, the Ninth Circuit properly held that the 1998 amendments to USERRA vested exclusive jurisdiction in state courts over private claims against state employers when Congress repealed earlier express grants of federal court jurisdiction and venue over such claims, and replaced them with an express grant of state court jurisdiction over such claims. Legislative history confirms that Congress did so in response to this Court's just-issued opinion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The federal government has recently agreed that, since the 1998 amendments

to USERRA, an individual may prosecute a private USERRA claim against a state employer only in state court.

If the Court needs to reach the immunity issue,[4] it must conclude that Congress' 1998 repeal of federal court jurisdiction and its substitution of state court jurisdiction over private USERRA actions against state employers are inconsistent with an unequivocally expressed intent to abrogate sovereign immunity. Moreover, no constitutional history or later legislative findings display state hostility to veterans' rights, prerequisites to abrogation under the War Powers Clause.

Neither Townsend's Questions Presented nor the body of his Petition addresses the availability of a private right of action under USERRA against individual supervisors. The passing reference to the issue in his Conclusion does not properly present that issue to this Court. No circuit court has recognized individual defendant liability under USERRA.

---

[4] The Court generally avoids addressing constitutional issues that may be mooted by statutory interpretation. *See Pearson v. Callahan*, 129 S. Ct. 808, 821 (2009).

REASONS TO DENY THE PETITION

A. The courts of appeal uniformly hold that district courts lack jurisdiction over private USERRA actions against state employers.

All three circuit courts that have reviewed the 1998 USERRA amendments agree that Congress thereby stripped federal courts of jurisdiction over USERRA suits by an individual against a state employer, and failed to abrogate state sovereign immunity. *Townsend v. University of Alaska*, 543 F.3d at 482-84; *McIntosh v. Partridge*, 540 F.3d 315, 320-21 (5th Cir. 2008) (only as to jurisdiction); *Velasquez v. Frapwell*, 165 F.3d 593, 593-94 (7th Cir. 1999) (*per curiam*) (only as to jurisdiction).

The federal government intervened in the Fifth Circuit matter, and successfully argued the absence of federal jurisdiction for such suits. *McIntosh v. Partridge*, 540 F.3d at 320.[5] Its position is consistent with the Labor Department's regulations implementing the amendments,[6] and associated

---

[5] The Justice Department's brief is available at: http://www.usdoj.gov/crt/briefs/mcintosh.pdf (last visited Feb. 24, 2009). The Department argued that Congress, in 1998, chose not to exercise its authority under the War Powers Clause to confer district courts with jurisdiction over private USERRA suits against state employers.

[6] 20 C.F.R. § 1002.305(b) ("If an action is brought against a State by a person, the action may be brought in a State court of competent jurisdiction according to the laws of the State"). The Department issued the regulations under 38 U.S.C. § 4331(a).

commentary.[7]

Townsend's initial claim of "conflicting case-law regarding changes made to USERRA in 1998," Pet. at p. 8, later becomes a claim that "conflicting Supreme Court opinions have held that . . . "a grant of jurisdiction to state courts framed such that a plaintiff 'may' bring or maintain a suit in state court does *not* grant *exclusive* jurisdiction to the state courts." *Id.* (emph. in orig.) That rephrased argument ignores Congress' repeal in 1998 of express provisions lodging jurisdiction and venue in district courts, *infra*. Townsend, thus, fails to show a compelling reason for this Court to review these jurisdictional and immunity issues. *See* Supreme Court Rule 10(a) and (c).

B. The 1998 amendments to USERRA vest state courts with exclusive jurisdiction over private actions against state employers.

USERRA forbids employment discrimination on the basis of membership in the armed forces. 38 U.S.C. §§ 4301(a)(3), 4311(a). An employer violates USERRA

---

[7] U. S. Dep't of Labor, Final Rule, USERRA Regulations, 70 Fed. Reg. at 75287 (Dec. 19, 2005) ("The United States district courts have jurisdiction over actions against a State or private employer brought by the Untied States, and actions against a private employer by a person. For actions brought by a person against a State, the action may be brought in a State court of competent jurisdiction."; U.S. Dep't of Labor, Proposed Rule, USERRA Regulations, 69 Fed. Reg. at 56280 (Sept. 20, 2004) ("the individual may file a complaint directly in the appropriate United States District Court or State court in cases involving a private sector or State employer, respectively").

if an employee's membership or obligation for service in the military is a motivating factor in an employer's adverse employment action taken against the employee, unless the employer proves it would have taken the same action in the absence of such membership or obligation. *See id.* § 4311(c)(1). To enforce its provisions, USERRA authorizes private suits for damages or injunctive relief against the employer, including a state employer. 38 U.S.C. §§ 4303(4)(A)(iii), 4323(a)(2), (b)(2), (d)(3).

Before the 1998 amendments to USERRA, the Act provided that "[t]he district courts of the United States shall have jurisdiction" over all USERRA actions, including those brought by a person against a State employer. *See* Pub. L. No. 103-353, § 2, 108 Stat. 3149, 3165 (1994), *amended by* Pub. L. No. 105-368, § 211(a), 112 Stat. 3315, 3329 (1998). The pre-1998 venue provision provided that "[i]n the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function." *Id.*

The Veterans Programs Enhancement Act of 1998 made substantial changes to the jurisdiction and venue provisions of USERRA. The amended jurisdictional provision now provides that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. § 4323(b)(2). The amended Act provides for federal jurisdiction over "an action against a State (as an employer) or a private employer commenced by the United States," and "an action against a private employer by a person." *Id.*

§ 4323(b)(1), (3). Where the Attorney General believes that a State has not complied with USERRA, the amended version authorizes the United States to substitute for an individual service member as the plaintiff in enforcement actions. *Id.* § 4323(a). The federal district court has jurisdiction over such an action. *Id.* § 4323(b)(1). The venue provision was also amended in 1998. It now provides that "[i]n the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function." *Id.*§ 4323(c)(1). "In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business." *Id.* § 4323(c)(2). The Act, as amended, includes no venue provision for an action by a private person against a State (as an employer).

The legislative history of the 1998 amendments confirms that Congress intended that USERRA actions brought by individuals against a state be filed in state court. The expressed reason for these amendments was Congress' concern about this Court's then-recent decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), where the Court held that Congress may abrogate a state's sovereign immunity only when acting pursuant to its powers under § 5 of the Fourteenth Amendment, and not when acting pursuant to its Commerce Clause powers. *Id.* at 59, 72-73. Congress perceived *Seminole Tribe* to throw the validity of USERRA's abrogation of state sovereign immunity in doubt. *See* 144 Cong. Rec. H1398 (daily ed. Mar. 24, 1998) (Statement of Rep. Evans) ("[S]everal courts have held the reasoning of the

Seminole Tribe case precludes federal court jurisdiction of claims to enforce federal rights of State employees under the Uniformed Service Employment and Reemployment Rights Act (USERRA).").

H.R. 3213, the jurisdictional provisions of which survive in the current version of 38 U.S.C. § 4323, was introduced on the House floor on March 24, 1998. *See* 144 Cong. Rec. H1396-02 (1998); *see also* H.R. 3213, 105th Cong. (1998). The stated purpose of the bill was, in part, "to clarify enforcement of veterans' employment and reemployment rights with respect to a State as an employer." 144 Cong. Rec. at H1396; *see also* H.R. 3213. The summary of the bill in the Report of the House Committee on Veterans' Affairs provides further insight into Congress' intent:

> This bill would substitute the United States for an individual veteran as the plaintiff in enforcement actions in cases where the Attorney General believes that a State has not complied with USERRA. Since the Attorney General, through U.S. Attorneys, is already involved in enforcing this law, the enactment of H.R. 3213 will not impose any new duties on the Attorney General. *Individuals not represented by the Attorney General would be able to bring enforcement actions in state court.*

H.R. Rep. No. 105-448, at 2 (1998) (emph. added), *available at* 1998 WL 117158.

The House Report thus makes plain that the purpose of the bill was to solve the *Seminole Tribe* problem by (1) substituting the United States for the service member in suits brought against states in

federal court; and (2) directing actions brought by individual service members, who were not represented by the United States, to state court. *See* H.R. Rep. No. 105-448, at 2-5 (discussing the problems created by *Seminole Tribe* for USERRA's enforcement scheme and the proposed solution); *see also* 144 Cong. Rec. at H1398 (statement of Rep. Quinn) ("This bill would substitute the United States for an individual veteran as the plaintiff in enforcement actions in cases where the Attorney General believes that a State has not complied with USERRA. . . . Individuals not represented by the Attorney General would be able to bring enforcement actions in State court.")[8]

The court of appeals below relied on that legislative history to conclude that district courts lack jurisdiction over private USERRA claims against state employers. The Fifth Circuit recently reached the same conclusion, *McIntosh v. Partridge*, 540 F.3d at 320-21, as had the Seventh Circuit earlier. *Velasquez v. Frapwell*, 165 F.3d at 593-94.[9]

---

[8] The recent Veterans' Benefits Improvement Act of 2008 bolstered veterans' rights under USERRA, but contained no provision to alter the cited holdings by the Fifth and Ninth Circuits of the previous several months. Pub. L. No. 110-389, 122 Stat. 4145 (enacted on Sept. 27, 2008, signed by the President on Oct. 10, 2008). Congress' presumed awareness of these rulings suggests that those appellate courts had adopted reasonable interpretations of the 1998 Amendments.

[9] Townsend errs in suggesting the presence of "conflicting case-law regarding changes made to USERRA in 1998" concerning any question presented to this court. Pet. at p. 8. Only one court has held that the 1998 amendments permit district courts to hear private USERRA claims against state employers. The district court's opinion in *McIntosh v. Partridge*, 2007 WL 1295836

Townsend's emphasis on "may" ignores not only this legislative history, but also the statutory text and structure, and background assumptions of jurisprudence. Congress' use of "may" in § 4323(b)(2) reflects appropriate congressional deference to the states' autonomy over the jurisdiction of their own courts.[10] It also indicates the range of remedial options available to a public employee. *See* 38 U.S.C. §§ 4322 (administrative complaint with the Secretary of Labor) and 4323(a)(1) (Labor Secretary's referral of complaint to Attorney General for Justice Department suit in federal court).[11] Use of "may" to recognize concurrent jurisdiction is superfluous.[12]

(W.D.Tex. 2007), was recently reversed by the Fifth Circuit. *Supra*.

[10] *Alden v. Maine*, 527 U.S. 706 (1999); *Townsend v. Univ. of Alaska*, 543 F.3d at 483, n.2.

[11] *See also Murphey v. Lanier*, 204 F.3d 911, 914 (9th Cir. 2000) (because federal jurisdiction is limited to that conferred by Congress, a statute stating that an action "may" be brought in state court "does not mean that federal jurisdiction also exists; instead, the failure to provide for federal jurisdiction indicates that there is none"); *Williams v. United Airlines, Inc.*, 500 F.3d 1019, 1022 (9th Cir. 2007) (a statute stating that a person "may" file an administrative complaint with the Secretary of Labor does not permit the person to elect to file a lawsuit in the district court).

[12] *Cooper Industries, Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 166 (2004). Thus, courts have rejected reading "may" to connote concurrent jurisdiction. *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 517 (3rd Cir. 1999); *Int. Science & Tech. Inst., Inc. v. Inacom Comm., Inc.*, 106 F.3d 1146, 1151-52 (4th Cir. 1997).

This Court's comments on "may" in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), and *Grable & Sons Metal Products, Inc. v. Darue Eng. & Mfg.*, 545 U.S. 308 (2005), do not point to a contrary result, because the statutory schemes in neither case presented the combination of repealed federal jurisdictional provisions and expressly designated state court jurisdiction that is present in USERRA. The statute examined in *Breuer* (the Fair Labor Standards Act) expressly provided that actions may be "maintained . . . in any Federal or State Court of competent jurisdiction,"[13] in contrast to USERRA, where Congress had, *via* the 1998 amendments to USERRA, *deleted* language conferring federal jurisdiction, and *substituting* language conferring state court jurisdiction over relevant USERA claims. *Grable & Sons*, in fact, counsels against broad readings of Section 1331 that would disturb "congressional judgment about the sound division of labor between state and federal courts . . ." 545 U.S. at 313, the result that would flow if Section 1331 were read to override Congress' 1998 trimming of federal court jurisdiction. The circuit courts that have interpreted USERRA have properly attended to the evolution of Congress' grants of USERRA jurisdiction, as well as to its use of antonyms.[14]

---

[13] 29 U.S.C. § 216(b). *See Breuer*, 538 U.S. at 694.

[14] As discussed in the preceding paragraph, Congress did not use "shall" and "may" in oppositional senses in USERRA.

C. The 11th Amendment bars a private USERRA claim in federal court against a state employer.

The court of appeals held that Congress has not unequivocally expressed an intent to abrogate sovereign immunity against USERRA claims. 543 F.3d at 484-85. Townsend now argues that the War Powers Clause of Article I authorizes congressional abrogation even in the absence of an unequivocal statement.

1. Congress exercised no authority under the War Powers Clause over private/state claims in federal court.

While earlier versions of USERRA and its antecedents had relied on the War Powers Clause,[15] the 1998 Congress concluded that this Court's then-recent opinion in *Seminole Tribe* had rendered questionable its authority to abrogate state immunity from private USERRA claims.[16] While Congress's authority may not be limited to the constitutional provisions it expressly relies on, it may not rest on powers that it has clearly renounced.

---

[15] *Diaz-Gandia v. Depena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996); *Reopell v. Commonwealth of Mass.*, 936 F.2d 12, 15-16 (1st Cir. 1991).

[16] H. R. Rep. No. 105-448 (1998), 1998 WL 117158 **2-5; 144 Cong. Rec. H1397-99 (daily ed. Mar. 24, 1998) (Comments by Reps. Evans, Quinn, Filner & Gilman). With the hindsight afforded *by Central Virginia Comm. Coll. v. Katz*, 546 U.S. 356 (2006), the 1998 Congress may have underestimated its Article I authority to trim state sovereignty, though *Katz* is still insufficiently expansive so as to help Townsend.

Even if Congress could be credited with War Powers authority that it disclaimed, its undoubtedly broad authority under that Clause does not *require* it to confer jurisdiction on district courts over claims asserted by veterans, as Townsend suggests. Pet. at pp. 21-24. Congress retains the discretion to allocate or withhold jurisdiction as its judgment dictates. *Grable & Sons*, *supra*. Here, *via* § 4323(b), Congress has expressed its judgment that a category of USERRA claims may be filed only in state courts. No notion of sovereign immunity requires this Court to countermand that congressional judgment.

2. No historical pattern of state hostility to veterans supports congressional exercise of War Powers Clause authority.

Even if Congress had decided in 1998 to use War Powers authority, it lacked the evidentiary foundation for abrogating state immunity. That Congress (nor any other, to the University's knowledge) made no findings of a pattern of state violations of USERRA. The opposite is true, in fact.

> Although disputes between state agencies and employees about the scope and meaning of USERRA and its predecessor laws (commonly referred to as Veterans Reemployment Rights (VVR) laws) have arisen from time to time, state employers regularly afford persons serving in the Armed Forces and Selected Reserve the rights guaranteed by these laws.

* * *

> Given the lack of controversy surrounding the general subject of VRR, and the relatively good record of compliance by state agencies with the law as it existed at that time [1991 – 1994], it is not surprising to find very little discussion in the 1991 and 1993 committee reports about the remedies available to state employees.[17]

The absence of any evidence of state hostility to veterans is critical, because this Court has required such an evidentiary record of pre-statute discrimination to support congressional exercise of power against states under the 14th Amendment,[18] and has relied on extensive evidence of pre-1789 state hostility to debtor relief to support congressional exercise of power against states under the Bankruptcy Clause.[19]

Congress' evident satisfaction with the states' respect for veterans' rights, *supra*, undercuts Townsend's prediction of enlistment shortfalls. Pet. at

---

[17] H. R. Rep. No. 105-448 (1998), 1998 WL 117158 *3 & **4-5 (emph. added).

[18] *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726-27 (2003).

[19] *Central Virginia Community College v. Katz*, 546 U.S. at 361. The *Katz* court also emphasized the limited (*in rem*) nature of Bankruptcy Court jurisdiction, *id.* at 369-70, which restricted federal intrusion into state interests. Federal court jurisdiction over private/state USERRA claims, in contrast, would permit the federal court to wield the entire panoply of remedial devices, including injunctions, reinstatement orders, liquidated damages, and attorney fees, as well as compensatory damages, outlined in 38 U.S.C. § 4323(c)(1).

pp. 7 & 25. Congress' continuing oversight of veterans legislation,[20] rather than judicial adoption of a strained reading of the 1998 amendments, offers the appropriate safeguard.

3. The constitutional structure does not evince the States' consent to federal court jurisdiction over War Powers Clause-supported legislation.

Nor is there any evidence that the states, during the drafting of the constitution, explicitly or implicitly consented to federal court jurisdiction over war or veterans-related claims against the states. For bankruptcy claims, the "uniform laws" envisioned by the constitutional drafters,[21] and the *in rem* nature of bankruptcy,[22] necessarily dictated exclusive federal jurisdiction. In contrast, the resolution of veterans claims requires the exercise of far more intrusive *in personam* jurisdiction, and is as easily accomplished in state court as in federal court. Congresses immediately following the constitutional convention did not propose or enact legislation "subordinat[ing] state sovereignty in the [War Powers] arena."[23] The War Powers Clause, thus, presents a substantially less compelling case for an inference that the original states agreed to subject themselves to federal court jurisdiction.

---

[20] *See* n.8, *supra*.

[21] 546 U.S. at 366, 368.

[22] 546 U.S. at 369-73.

[23] 546 U.S. at 363.

Given the absence of any implied consent reflected by the constitutional structure, the absence of any pattern of state hostility to veterans, and the absence of any congressional intent to confer jurisdiction over these claims to federal courts, state arms such as the University retain their sovereign immunity from private USERRA claims in federal court.

4. Section 1331 does not abrogate the University's sovereign immunity.

Congress' targeted deletion of federal court jurisdiction over Townsend's category of USERRA claim, *supra*, trumps the generalized assertion of federal question jurisdiction in 28 U.S.C. § 1331. *See U. S. Dep't of HUD v. Rucker*, 535 U.S. 125, 134 n.2 (2002). Even more so, the generalities of Section 1331 are insufficient to unequivocally express congressional intent to abrogate state sovereign immunity. *Seminole Tribe*, 517 U.S. at 86 (Stevens, J., dissenting).

D. The availability of a private right of action under USERRA against individual public supervisors is not properly before this Court.

While Townsend, in his Conclusion, asks this Court to hold that USERRA permits suit against individual supervisor-employees, Pet. at pp. 25-26, he omitted that issue from his Questions Presented, *id.* at i, and did not brief it in the body of his Petition. Townsend has, thus, waived the presentation of this issue. Supreme Court Rule 14.1(a) (last sentence); 14(h); 14.4. *See Schiro v. Farley*, 510 U.S. 222, 229 (1994) (failure to brief argument in Opposition to Petition waives the argument).

CONCLUSION

Townsend has not established any compelling reason for this Court to grant his Petition. Therefore, Respondent University respectfully requests the Court to deny the Petition.

Respectfully submitted,

William B. Schendel, Atty.
Counsel of Record
SCHENDEL LAW OFFICE
250 Cushman Street
Suite 500
Fairbanks, Alaska 99701
(907) 451-6500

Mark Ashburn, Atty.
ASHBURN & MASON, P.C.
1227 West Ninth Avenue
Suite 200
Anchorage, Alaska 99501
(907) 276-4331

Counsel for Respondents